STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED May 22, 2007
v	No. 258148 Livingston Circuit Court
TAD SPENCER DEWULF, Defendant-Appellant.	LC No. 03-013712-FH

Before: Markey, P.J., and Sawyer and Bandstra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of interfering with a police investigation, MCL 750.483a(4)(b), and assault and battery (domestic), MCL 750.812. He was sentenced as a fourth habitual offender, MCL 769.12, to concurrent prison terms of 9 to 30 years for the interfering with a police investigation conviction and 93 days for the assault conviction. Defendant's sentence for interfering with a police investigation was to be served consecutive to a sentence in another case, because defendant was on parole from that other offense when he committed the instant offense. We affirm defendant's convictions and sentence for assault, but remand for resentencing on the conviction for interfering with a police investigation conviction.

I. Facts

Defendant's convictions arise from an altercation between defendant and the victim in the early morning hours of July 6, 2003. Earlier in the evening, defendant and the victim were at a bar. The victim testified that she and defendant began arguing because defendant thought that she was flirting with a friend's boyfriend. After leaving the bar, defendant and the victim drove to the victim's house where defendant had left his truck. On the way, defendant demanded that the victim stop the car and when she did, he tried to shove her out, striking the victim in the jaw. Defendant apologized and they returned to the victim's home. As the victim was entering her house, she heard defendant say that he would kill her if she called the police. She believed him and became scared.

The next morning, the victim sought medical treatment for her jaw. The police were called because the victim was injured in an assault. The victim did not identify her attacker to any of the medical personnel and spoke to the police for approximately 15 minutes before she identified defendant. The questioning officer stated that the victim's reluctance to identify defendant interfered with his investigation.

II. Right to Counsel

Defendant argues that his criminal convictions must be vacated because the trial court failed to secure a proper wavier of counsel from defendant at the preliminary examination.

Defendant had a right to counsel at his preliminary examination, which is a critical stage in the proceedings. *Coleman v Alabama*, 399 US 1, 9-10; 90 S Ct 1999; 26 L Ed 2d 387 (1970). Plaintiff concedes that the trial court failed to comply with MCR 6.005 or the requirements for obtaining a proper waiver of counsel announced in *People v Anderson*, 398 Mich 361; 247 NW2d 857 (1976). The failure to substantially comply with these requirements renders defendant's waiver of counsel ineffective. *People v Russell*, 471 Mich 182, 191-192; 684 NW2d 745 (2004).

An ineffective waiver of the right to counsel is a constitutional error. *People v Willing*, 267 Mich App 208, 223; 704 NW2d 472 (2005). In *People v Carter*, 412 Mich 214; 217-218; 313 NW2d 896 (1981), our Supreme Court held that the deprivation of counsel at a preliminary examination does not require automatic reversal, and instead a harmless error analysis may be applied, following the decision and reasoning in *Coleman, supra* at 9-11.

Defendant argues that he was prejudiced because he was denied the ability to develop before trial his claim that the victim admitted fabricating the allegations. However, defense counsel appeared on behalf of defendant almost eight months before the trial began and defendant was not prevented from presenting such a defense at trial. This case is distinguishable from *Willing, supra*, in which the defendant was denied his right to counsel at both a *Walker*[1] and an entrapment hearing. These hearings were the defendant's only opportunity to present an entrapment defense and led to the admission of the defendant's police statement at trial. Here, defendant was able to present his defense at trial, where he was represented by counsel, and no evidence procured at the preliminary examination was used against him at trial. We therefore conclude that defendant was not prejudiced by his ineffective waiver of counsel at the preliminary examination and, accordingly, is not entitled to a new trial.

III. Jury Selection

Defendant argues that the prosecutor improperly used five peremptory challenges to remove men from the jury panel and, although there was no objection to the prosecutor's use of peremptory challenges at trial, that the trial court had a duty to raise a *Batson*[2] challenge on its own motion.[3] Whether a trial court has a duty to perform a function on its own motion is a

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[1] *People v Walker (On Rehearing)*, 374 Mich 331; 132 NW2d 87 (1965).

[2] *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986).

[3] The rule in *Batson*, prohibiting the exercise of peremptory challenges to dismiss potential jurors on the basis of their race, was extended to prohibit the use of peremptory challenges to exclude potential jurors on the basis of their gender in *JEB v Alabama ex rel TB*, 511 US 127, 128-129; 114 S Ct 1419; 128 L Ed 2d 89 (1994).

question of law that this Court reviews de novo. *People v Gonzalez*, 468 Mich 636, 641; 664 NW2d 159 (2003).

Our Supreme Court has held that a trial court has the authority to raise a *Batson* issue sua sponte, but it did not address when, if ever, it had a duty to do so. *People v Bell*, 473 Mich 275, 287; 702 NW2d 128 (2005), amended 474 Mich 1201 (2005). However, other jurisdictions have addressed this issue. The Fourth Circuit Court of Appeals held that it is not plain error when a trial court fails to prevent a party from using peremptory challenges in an allegedly discriminatory manner, absent a timely objection.

> Neither *Batson* nor its progeny suggests that it is the duty of the court to act *sua sponte* to prevent discriminatory exclusion of jurors. Rather, even in criminal cases, the objection is deemed waived if not timely raised. *United States v Ratcliff*, 806 F 2d 1253, 1256 (CA 5, 1986), cert den 481 US 1004; 107 S Ct 1625; 95 L Ed 2d 199 (1987); *Virgin Islands v Forte*, 806 F 2d 73, 76 (CA 3, 1986) (*Batson* does not require that "allowance of race-based challenges should be declared plain error" when not preserved by objection); *see Ford v Georgia*, 498 US 411; 111 S Ct 850, 857; 112 L Ed 2d 935 (1991) (a state "requirement that any *Batson* claim be raised not only before trial, but in the period between the selection of the jurors and the administration of their oaths, is a sensible rule" and does not contravene *Batson* inasmuch as *Batson* itself did not " 'formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges' " (quoting *Batson*, 476 US at 99), or "decide when an objection must be made to be timely"); see also *Powers v Ohio*, 499 US 400; 111 S Ct 1364, 1374; 113 L Ed 2d 411 (1991) (trial courts are to develop rules "permit[ting] legitimate and well-founded objections to the use of peremptory challenges as a mask for race prejudice"); *United States v Rudas*, 905 F2d 38 (CA 2, 1990) (defendant's failure to "expressly indicate an intention to pursue the *Batson* claim" and dispute the government's explanation for its peremptory challenges deemed a waiver of the objection). [*Clark v Newport News Shipbuilding & Dry Dock Co*, 937 F2d 934, 939-940 (CA 4, 1991).]

Similarly, the Illinois Court of Appeals has held that

> although a trial court has a *right* to raise *Batson* objections *sua sponte* there is no corresponding *duty* to do so, and a defendant who fails to timely object to a prosecutor's challenges *cannot avoid waiver* by arguing that the trial court had a *duty* to question the prosecutor's motives. This is precisely the formulation adopted by our supreme court when it held that a trial court has the *discretion* to remove a juror for cause *sua sponte* but that it has no *duty* to do so. [*People v Rivera*, 348 Ill App 3d 168, 176; 810 NE2d 129 (2004) (emphasis in original).[4]]

[4] The Illinois Supreme Court subsequently affirmed the decision in *Rivera*, agreeing that a trial court has the authority to raise a *Batson* issue *sua sponte*. *People v Rivera*, 221 Ill 2d 481, 504; 852 NE2d 771 (2006).

Our Supreme Court held in *Bell*, *supra* at 287, that "a trial court *may* sua sponte raise a *Batson* issue." (Emphasis added.) But the Court did not hold that it must. To find such a duty would place an onerous burden on the trial court in monitoring jury selection and allow a party to harbor error as an appellate parachute. Accordingly, consistent with other courts that have addressed this issue, we reject defendant's claim that the trial court had a duty to raise a *Batson* issue sua sponte.

IV. Admissibility of Evidence

Defendant argues that the trial court erroneously excluded evidence that the victim had sexual relations with another man on a prior occasion, and also improperly excluded evidence of a previous personal protection order (PPO) that the victim obtained against another man. This Court reviews for an abuse of discretion a trial court's decision whether to admit evidence. *People v Katt*, 468 Mich 272, 278; 662 NW2d 12 (2003). An abuse of discretion occurs when the result is outside the principled range of outcomes. *People v Babcock*, 469 Mich 247, 269; 666 NW2d 231 (2003).

At trial, the victim denied having a relationship with Ryan Woodid. Defendant then asked the victim if she ever had sexual relations with Woodid. The trial court excluded the testimony under the rape shield statute, MCL 750.520j. We agree with defendant that the statute was not applicable because, by its terms, it only provides that evidence of a victim's sexual conduct "shall not be admitted under sections 520b to 520g," subject to certain exceptions. MCL 750.520j(1). This case did not involve a prosecution under MCL 750.520b to MCL 750.520g, so the rape shield statute did not require exclusion of the evidence.

To be admissible, however, evidence must still be relevant. MRE 402. "[R]elevant evidence is any fact that is of consequence to the determination of the action. The purpose of admitting relevant evidence is to provide the trier of fact with as much useful information as possible." *People v Fisher*, 449 Mich 441, 452; 537 NW2d 577 (1995) (citations omitted). Defendant sought to admit evidence that he, Woodid, and the victim engaged in sexual acts together to show that it was unreasonable that he would be jealous of the victim flirting with another man on the night of the alleged assault. Such evidence would only have tended to show that defendant was not jealous on an occasion where he agreed to the sexual conduct. There was no evidence suggesting that the charged offenses involved similar circumstances. A decision on a close evidentiary question ordinarily cannot be an abuse of discretion. *People v Meshell*, 265 Mich App 616, 637; 696 NW2d 754 (2005). In this case, the trial court's exclusion of the evidence was not outside the principled range of outcomes.

Defendant also argues that the trial court erred in excluding evidence regarding a PPO that the victim allegedly obtained against the father of her son. However, the record discloses that the trial court did not exclude any such evidence. The prosecutor's objection to such evidence was overruled and the victim testified that she did not believe that she had obtained a PPO against her son's father or anyone else before obtaining the one against defendant. Thus, there was no error.

V. Sufficiency of the Evidence

Defendant argues that the evidence was insufficient to support his conviction for interfering with a police investigation because MCL 750.483a(3)(b) requires that there be a pending investigation at the time the victim was threatened, and no such evidence was presented in this case. In reviewing the sufficiency of the evidence, this Court must view the evidence in the light most favorable to the prosecution to determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Tombs*, 472 Mich 446, 459; 697 NW2d 494 (2005). Statutory interpretation is a question of law, which is considered de novo on appeal. *People v Davis*, 468 Mich 77, 79; 658 NW2d 800 (2003).

MCL 750.483a(3)(b) provides that a person shall not "[t]hreaten or intimidate any person to influence a person's statement to a police officer conducting a lawful investigation of a crime or the presentation of evidence to a police officer conducting a lawful investigation of a crime." The primary goal of judicial interpretation of statutes is to ascertain and give effect to the intent of the Legislature. *Davis, supra*. The first criterion in determining intent is the specific language of the statute. *Id.* A plain reading of the statute shows that it is sufficient that the purpose of the threat is to influence a person's statement to a police officer when that officer questions the person in connection with a lawful investigation. The phrase "conducting a lawful investigation" describes the police officer's reason for obtaining the statement. It also describes the context in which the threat was designed to affect the person's statement. MCL 750.483a(3)(b) does not require that there be a pending investigation at the time the threat is made.

Defendant argues that such a construction renders MCL 750.483a(5) nugatory. We disagree, because MCL 750.483a(5) applies to a different situation.[5] That subsection deals with evidence in official proceedings, not a police investigation. An "official proceeding," as used in this statute, means a proceeding where evidence is heard under oath. MCL 750.483a(11)(a). We disagree with defendant's argument that the Legislature's use of the word "future" in MCL 750.483a(5)(a) means that it consciously intended to omit that word from subsection (3)(b), thus reflecting an intent that subsection (3)(b) apply only where an investigation is already pending. Generally, the omission of a word or phrase in one part of a statute, which is included in another part, should be construed as intentional. See *People v Monaco*, 474 Mich 48, 58; 710 NW2d 46 (2006). If this construction rule is followed, however, defendant's interpretation also would be prohibited. MCL 750.483a(5)(a) uses the phrase "present or future," but subsection (3)(b) does not include the word "present" either. In any event, the rules of statutory construction are mere guides, not hard and fast rules. *Niles Twp v Berrien Co Bd of Comm'rs,* 261 Mich App 308, 313; 683 NW2d 148 (2004).

[5] MCL 750.483a(5)(a) provides, in part, that it is unlawful for a person to "[k]nowingly and intentionally remove, alter, conceal, destroy, or otherwise tamper with evidence to be offered in a present or future official proceeding."

Accordingly, we reject defendant's claim that defense counsel was ineffective for failing to object to the applicability of the statute to his conduct. Defense counsel need not make a meritless objection. *People v Mack*, 265 Mich App 122, 130; 695 NW2d 342 (2005).

Regarding the sufficiency of the evidence, the victim testified that defendant told her that he would kill her if she called the police, that his threat scared her, and that she initially did not identify defendant as her attacker because of this fear. The questioning officer testified that the victim's initial refusal to specifically identify her attacker interfered with his investigation. Thus, viewed in a light most favorable to the prosecution, the evidence was sufficient to support defendant's conviction.

VI. Jury Instructions

Defendant argues that although the jury was properly instructed on the offense of interfering with a police investigation, subsequent statements by the trial court misled the jury into believing that it did not need to find that the police were conducting an investigation. Because defendant did not object at trial, we review this issue only for plain error affecting defendant's substantial rights. *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).

In the context of instructing the jury on specific intent, the trial court twice stated, "The crimes of interfering with a police investigation, that is, committing the crime of threatening to kill or injure." Viewed in context, the trial court was merely restating the charge that applied to defendant, it was not attempting to instruct on the elements of that offense. As defendant concedes, the trial court had previously properly instructed the jury on the elements of interfering with a police investigation. Thus, there was no plain error.

VII. Ineffective Assistance of Counsel

Defendant raises multiple claims of ineffective assistance of counsel. The determination whether a defendant has been deprived of the effective assistance of counsel presents a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). Although defendant raised some of his claims in a motion for a new trial, he did not append any additional supportive documents and a *Ginther*[6] hearing was not held.[7] Therefore, our review is limited to mistakes apparent from the record. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000).

To establish ineffective assistance of counsel, a defendant must show that counsel's deficient performance denied him the Sixth Amendment right to counsel and that, but for counsel's errors, the result of the proceedings would have been different. *Mack*, *supra* at 129. Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Solmonson*, 261 Mich App 657, 663; 683 NW2d 761 (2004).

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[6] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

[7] Defendant filed three motions in this Court to remand for a *Ginther* hearing, all of which were denied.

A. Defense Counsel's Incapacitation

Defendant asserts that newly discovered evidence shows that defense counsel was incapacitated for all but ten days of his representation of defendant. The documentary evidence submitted by defendant shows that defense counsel was only incapacitated for the first few months of his representation of defendant.[8] The only proceeding held during this time was a pretrial hearing. Defense counsel's incapacitation was resolved by the beginning of 2004, four months before defendant's trial. There is no indication that counsel's earlier incapacitation affected his representation of defendant at trial.

B. Jury Voir Dire

Defendant argues that the trial court improperly prohibited him from questioning potential jurors and that defense counsel was ineffective when he nevertheless expressed satisfaction with the jury.

MCR 2.511(G) provides that after any juror is removed from the panel, a new juror must be selected and examined. MCR 2.511(C) provides that the trial court may conduct the examination or permit the attorneys to do so. Thus, defendant had a right to have the jurors examined, but not necessarily in the manner he desired. The trial court's voir dire questioning was directed at the entire venire and the prospective jurors, regardless of their seat position, raised their hands in response. The voir dire system used was an alternate process that the parties agreed to before selection. The record discloses that while defense counsel principally directed his examination at the potential jurors seated in the jury box, he also directed questions to ones seated outside the box. Therefore, the record does not support defendant's claim that he was denied an opportunity to question replacement jurors. Accordingly, defense counsel was not ineffective for expressing satisfaction with the jury. *Mack*, *supra* at 130.

C. Prosecutor's Questioning of Witnesses

Defendant argues that defense counsel was ineffective for failing to object to the prosecutor's questions that elicited testimony from witnesses that they believed the victim was being truthful.

"It is generally improper for a witness to comment or provide an opinion on the credibility of another witness because credibility matters are to be determined by the jury." *People v Dobek*, ___ Mich App ___; ___ NW2d ___ (Docket No. 264366, issued January 30, 2007), slip op at 6, lv pending. The people argue that the prosecutor merely inartfully asked if the victim's injury was consistent with her version of events and did not ask the witnesses to

[8] In late 2003, defense counsel had surgery on his large intestines and suffered from severe depression and alcohol addiction. He claimed incapacitation from September 2003 to the end of the year in conjunction with proceedings before the Attorney Discipline Board. Defense counsel's license was suspended for the month of December 2003, due to client neglect dating before mid-2003. Defendant's trial was held in May 2004.

comment on the victim's credibility. We disagree because the prosecutor also asked each witness if the victim's injury was consistent with her version of events.

However, defendant must overcome the strong presumption that defense counsel's action was sound trial strategy. *People v Matuszak*, 263 Mich App 42, 58; 687 NW2d 342 (2004). While the prosecutor's questions were improper, it was clear from the witnesses' testimony that they believed the victim was telling the truth, and an objection would have highlighted the testimony to the jury. Also, defense counsel questioned the officer in depth about why the victim's version of events that evening was not investigated beyond her statement, questioned the nurse regarding how much information about the previous evening the victim actually shared, implying that she did not have all the facts, and directly attacked the victim's credibility on cross-examination. Defendant has not overcome the presumption of sound trial strategy.

D. Closing Argument

Defendant argues that defense counsel was ineffective because he made an argument that favored the prosecution during closing argument. Defense counsel argued that the victim's actions belied her assertion that she was fearful of defendant. Illustrating this point, he stated that obtaining a personal protection order against defendant was consistent with being fearful, but that subsequently calling defendant and setting up a meeting with him was not. Viewed in context, defense counsel's closing argument was not objectively unreasonable.

E. Other Claims

Defendant argues that defense counsel was ineffective because he did not meaningfully engage in an adversarial testing of the prosecution's case and gave only a "quarter-hearted attempt to discredit the victim." We disagree. The record shows that defense counsel vigorously cross-examined the victim regarding her version of events, alleged fear of defendant, lack of visible injury, and potential motive for claiming that defendant assaulted her.

Defendant also takes issue with defense counsel's failure to call Woodid and other witnesses who were at the bar with defendant and the victim on the night of the assault. Defendant asserts that there was no reasonable trial strategy for not calling these witnesses. However, the witnesses were not present during the charged assault or threat, and defendant has not presented any evidence to show that they would have testified that defendant and the victim were not arguing, as defendant claims. Woodid did not witness either event and the only testimony he could offer related to the victim's sexual conduct, which we previously determined was properly excluded. Finally, in regard to not calling defendant to testify, defendant had numerous prior criminal convictions that could have been used for impeachment. Defense counsel also may have reasonably believed that defendant would not have been a good witness. The decision whether to have defendant testify was a matter of trial strategy, and defendant has not overcome the presumption of sound strategy. *People v Dixon*, 263 Mich App 393, 398; 688 NW2d 308 (2004); *Matuszak*, *supra* at 58.

Defendant also claims that defense counsel refused to honor his request to impeach the questioning officer and the victim on every possible aspect of their testimony. However, the record shows that defense counsel effectively cross-examined these witnesses. That he did not challenge every aspect of their testimony that defendant desired can be construed as trial

strategy. Defense counsel had a duty to consult with defendant regarding important decisions, but not every tactical one. *Florida v Nixon*, 543 US 175, 187; 125 S Ct 551; 160 L Ed 2d 565 (2004). Furthermore, defendant does not indicate what specific matters defense counsel allegedly failed to pursue.

Defendant further asserts that defense counsel failed to object when defendant's constitutional rights were being violated, but does not identify any specific instances. Likewise, defendant contends that defense counsel failed to competently counsel him or assist him in understanding the true benefits of an offered plea bargain, but again does not identify any specific instances or explain what benefits counsel failed to help him understand. Defendant may not simply announce a position and leave it to this Court to make his argument for him. *Matuszak, supra* at 598.

Lastly, defendant asserts that defense counsel effectively denied him his right to testify. The record shows that defendant was given an opportunity to testify and refused, on the advice of his counsel. Defendant was free to accept or reject counsel's advice. That defendant now regrets following defense counsel's advice does not render defense counsel ineffective.

F. Conclusion

For the foregoing reasons, defendant has failed to show that his right to the effective assistance of counsel was violated.

VIII. Cumulative Errors

Defendant argues that the cumulative effect of the errors at trial entitle him to a new trial. This Court reviews defendant's claim regarding the cumulative effect of errors to determine if he was denied a fair trial. *People v Ackerman*, 257 Mich App 434, 454; 669 NW2d 818 (2003). In light of the foregoing analysis, the only error at trial involved the prosecutor's improper questions regarding the victim's credibility. Because there were no other errors, reversal under a cumulative error theory is not warranted.

IX. Sentencing

This Court reviews the scoring of the sentencing guidelines to determine whether the sentencing court properly exercised its discretion and whether the evidence adequately supports a particular score. *People v McLaughlin*, 258 Mich App 635, 671; 672 NW2d 860 (2003). Statutory interpretation of the sentencing guidelines is reviewed de novo. *People v Houston*, 473 Mich 399, 403; 702 NW2d 530 (2005).

A Offense Variables 3 and 10

Defendant asserts that ten points were improperly scored for OV 3 and OV 10 because the facts that supported the scores were not found by a jury beyond a reasonable doubt, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). Defendant's argument is without merit because our Supreme Court in *People v Drohan*, 475 Mich 140, 159-160, 164; 715 NW2d 778 (2006), specifically rejected the application of *Blakely* to Michigan's indeterminate sentencing scheme.

B. Offense Variable 13

Defendant argues that the trial court erred in scoring 25 points for OV 13 where defendant's last conviction for an assaultive offense occurred 11 years before the sentencing offense. OV 13 states that 25 points are to be scored where "[t]he offense was part of a pattern of felonious criminal activity involving 3 or more crimes against a person." MCL 777.43(1)(b). The variable further provides that "all crimes within a 5-year period, including the sentencing offense, shall be counted regardless of whether the offense resulted in a conviction." MCL 777.43(2)(a).

The prosecutor concedes that this variable was improperly scored in light of our Supreme Court's decision in *People v Francisco*, 474 Mich 82, 86-87; 711 NW2d 44 (2006). Because this scoring error affects the sentencing guidelines range, we remand for resentencing. *Id.*

The prosecutor asserts that a remand is unnecessary because 15 points should have been scored for OV 19, based on this Court's recent decision in *People v Endres (On Remand)*, 269 Mich App 414; 711 NW2d 398 (2006). However, the scoring of this offense variable was not considered below and we decline to consider it for the first time on appeal. Plaintiff is free to raise this scoring issue when defendant is resentenced.

Because we conclude that defendant is entitled to resentencing, his claim that his sentence constitutes cruel and unusual punishment is moot.

C. Other Factors

Although we remand this case for resentencing, we address defendant's remaining sentencing issues because they may arise during resentencing. Defendant argues that the trial court considered several impermissible factors in fashioning defendant's sentence. He first asserts that the trial court should not have considered the circumstances of his arrest because he was never charged with any crime stemming from his arrest. The evidence indicated that defendant had a steak knife in his pocket when he was arrested and refused to comply with the officer's command not to touch the knife. The trial court originally stated that it would not consider evidence regarding defendant's arrest, but then received testimony from the arresting officer after defendant stated that he was compliant when he was arrested, having learned his lesson from previous resisting or obstructing convictions.

In imposing sentence, a court properly may consider the severity and nature of the crime, the circumstances surrounding the criminal behavior, the defendant's attitude toward his criminal behavior, the defendant's social and personal history, and the defendant's criminal history, including subsequent offenses. *People v Oliver*, 242 Mich App 92, 98; 617 NW2d 721 (2000). Here, defendant gave his version of events to show that he was rehabilitated and the trial court heard the arresting officer's testimony account of defendant's conduct when he was arrested. This was not an impermissible consideration.

Defendant next argues that the presentence investigation report (PSIR) improperly included inferences derived from a letter he wrote to his friend while in jail. Defendant does not contend that the probation officer's statements regarding the letter's content were inaccurate. Rather, he only objects to the inferences and conclusions drawn from the letter by the probation

officer about defendant's character. Conclusions about a defendant's character drawn from undisputed facts are not factual inaccuracies, but rather permissible opinions. *People v Wybrecht*, 222 Mich App 160, 173-174; 564 NW2d 903 (1997).

Defendant also argues that the inclusion of a victim impact statement in the PSIR was improper. It is undisputed that the probation officer wrote the statement in the PSIR from notes he took during a telephone conversation with the victim. Defendant asserts that the statement violated MCR 6.425(A)(7) and MCL 771.14(2)(b) because the victim did not write it personally or request that it be included. MCR 6.425(A)(7) states that the PSIR is to include "if provided and requested by the victim, a written impact statement as provided by law." MCL 771.14(2)(b) states that the PSIR is to include "[i]f requested by a victim, any written impact statement submitted by the victim under the crime victim's rights act, 1985 PA 87, MCL 780.751 to 780.834."

However, neither the court rule nor the statute require the victim impact statement to be in the victim's own hand. MCL 780.763(1)(c) states that the prosecutor must inform the victim that he or she has a right "to make a written or oral impact statement for use in the preparation of a presentence investigation report concerning the defendant." Additionally, MCL 780.764 provides that "[t]he victim has the right to submit or make a written or oral impact statement to the probation officer for use by that officer in preparing a presentence investigation report . . . ." Furthermore, MCL 780.764 provides that "[a] victim's written statement shall upon the victim's request, be included in the presentence investigation report." Here, the probation officer testified that the impact statement in the PSIR accurately reflected the victim's statement, and there is no indication that the victim did not want the information conveyed to the trial court. Therefore, the trial court did not err when it decided to leave the victim impact statement in the PSIR.

D. Jail Credit

Defendant argues that he was improperly denied credit against his sentence where, although he was on parole when he committed the offense, he was not required to serve any additional time for the paroled offense. Whether defendant is entitled to credit for time served is a question of law that this Court reviews de novo. *People v Givans*, 227 Mich App 113, 124; 575 NW2d 84 (1997). MCL 769.11b provides that when a person convicted of a crime has served time in jail before sentencing "because of being denied or unable to furnish bond" for the convicted offense, he is entitled to credit for that time against his sentence.

In *People v Stead*, 270 Mich App 550, 551-552; 716 NW2d 324 (2006), this Court explained:

> "When a parolee is arrested for a new criminal offense, he is held on a parole detainer until he is convicted of that offense, and he is not entitled to credit for time served in jail on the sentence for the new offense." *People v Seiders*, 262 Mich App 702, 705; 686 NW2d 821 (2004). Instead, a parole detainee convicted of a new offense is entitled to have jail credit applied exclusively to the sentence from which parole was granted. *Id*. Credit is not available to a parole detainee for time spent in jail attendant to a new offense because "bond is neither set nor denied when a defendant is held in jail on a parole detainer." *Id*. at 707.

Thus, regardless of whether defendant was required to serve additional time for the paroled offense, he was denied or unable to furnish bond because he was a parole detainee, not because of the offense of which he was convicted. Therefore, defendant is not entitled to jail credit.

Defendant's convictions and domestic violence sentence are affirmed, but the sentence for interfering with a police investigation is vacated and the case is remanded for resentencing. We do not retain jurisdiction.

/s/ Jane E. Markey
/s/ David H. Sawyer
/s/ Richard A. Bandstra